BASIS STATEMENT
Adoption of Chapter 342, Significant Groundwater Wells

Permission was given by the Board of Environmental Protection (BEP) on 12/17/2009 to post Chapter 342 to public comment without a hearing. The comment deadline was 1/29/2010 at 5:00 pm. Comments were submitted by the following persons:

(1) Philip F.W. Ahrens (Nestle Waters North America Inc. or "Poland Spring")
(2) Barbara Britten
(3) Gloria Dyer
(4) Bart Hague (President, Maine Congress of Lake Association)

The source of each comment below is indicated in parenthesis, by number, at the end of the comment. No request for a public hearing was received.

NOTE: A clarifying change was made to the definition of "significant groundwater well" on the advice of the Office of Attorney General. The words "for the purposes of this rule" were inserted in the definition.

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1. Comment. Section 3(D), paragraph 2, is difficult to read and understand (it includes the word "not" twice before using "other than") and doesn't fit within the "definitions" section of the draft rule. Functionally, it appears to be better suited to appear in Section 5, which deals with exemptions from payment of fees. The rule as drafted appears to try to exclude certain activities from the definition of "significant groundwater" rather than simply exempting the activity from the fee requirement as called for by the legislation. The basis listed in the draft rule, Paragraph 3 of PL 2009, Chapter 295(4), allows the Department discretion to exclude certain types of pumping or certain significant groundwater wells from the fee requirement. Our suggestion is that whatever is intended to be covered by Paragraph 2 of Section 3(D) be moved to Paragraph 5.

Section 5, Waiver and Permit Modification, should be based on the substance of Paragraph 3 of PL 2009, Chapter 295(4) by describing which types of pumping or significant groundwater wells are excluded from the fee requirement. The language in the draft rule, by using the concept of waiver, implies that a fee is actually due but that the Department is waiving the payment under certain circumstances. It would be preferable and consistent with the legislative language to use Paragraph 5 to describe those situations when no fee is required. A suggested alternative for Section 5, which covers what seems to be intended in Paragraph 2 of Section 3(D) of the draft, would read as follows:

5. Exclusions from Fee Requirement

The following activities are exempt from payment of a fee under this rule:

A. Groundwater that is withdrawn and returned to the same bedrock or surficial aquifer from which it is withdrawn, such as water withdrawn for geothermal purposes;
B. Groundwater withdrawn for pump tests and background and recovery monitoring;
C. Other types of pumping or significant groundwater wells or portions of significant groundwater wells where the Department determines that the fee should be excluded because of

the applicability of other fees, the type or amount of pumping or insignificant risk to protect the natural resources or other wells. (1)

Response. It is agreed that Section 3(D), paragraph 2, could be easier to read. The department has moved the exclusion specified in Section 3(D)(2) of the Rule to Section 5, and broken Section 5, waiver and permit modification, into two sections, so as to address modifications in a separate section. Moving the exclusion to Section 5 is not a substantive change. The Maine Department of Environmental Protection (department) has also changed the approach from a "waiver" of a fee to an "exclusion" as suggested by the comment.

PL 2009, ch. 295(15), second and third paragraph, read:

> For purposes of this section, "significant groundwater well" has the same meaning as in the Maine Revised Statutes, Title 38, section 480-B, subsection 9-A, except that a development or part of a development requiring a permit pursuant to Title 38, chapter 3, subchapter 1, article 6 or a structure or development requiring a permit from the Maine Land Use Regulation Commission is not excluded from the definition of "significant groundwater well."
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> The Department of Environmental Protection or the Maine Land Use Regulation Commission may exclude certain types of pumping or certain significant groundwater wells or portions of significant groundwater wells from a fee requirement when appropriate based upon considerations such as the applicability of other fees, the type or amount of pumping or insignificant risk to protected natural resources or other wells.

The amendment text suggested in the comment was not incorporated as written. Most differences were minor and went to drafting issues. However, part of the text suggested in the comment added an additional exclusion from the fee requirement:

> C. Other types of pumping or significant groundwater wells or portions of significant groundwater wells where the Department determines that the fee should be excluded because of the applicability of other fees, the type or amount of pumping or insignificant risk to protect the natural resources or other wells.

This proposed rule text repeats text from PL 2009, ch. 295(4). The unallocated text in Chapter 295(4) authorizes but does not require the department to exclude other types of pumping or wells from the fee requirement. The specific exclusions that the department considers appropriate at this time have been included in the proposed rule. They concern situations where there is only a minor amount of required monitoring, or water pumped is returned to the same surficial or bedrock aquifer.

2. Comment. It does not appear that Section 5(B), Well Permanently Removed from Production, is needed in this rule, because the fee requirement is based on the amount of water actually withdrawn and not on the permit limit. (1)

Response. This provision has been retained. As provided in Section 4(B)(3) of the proposed chapter, the permit limit may be relevant to a determination of the fee, in the absence of the receipt of timely, acceptable documentation concerning pumping. If a well is put permanently out of production, the permittee may amend the permit to reflect the decrease in permit limit, and so avoid the need to report on the well in the future.

3. Comment. Section 6 and 7 (Public Information Meeting and Pre-application and Pre-submission meeting) should be relocated to Chapter 2, Rules Concerning the Processing of Applications and Other

Administrative Matters. Permit applicants regularly review Chapter 2 for DEP administrative procedures. Section 3 of PL 2009, Chapter 295 actually references the DEP administrative rules. Although the law does not explicitly require that these requirements appear in Chapter 2, common sense and the statutory language suggest Chapter 2 would be a preferable location for these administrative procedures.(1)

Response. The statutory language does not require that the procedural provisions appear in a specific chapter. The department agrees that Chapter 2 would be one logical location, and this possibility was investigated early in the planning for this rulemaking. It was not found to be an option at this time. Therefore, the procedural requirements concerning significant groundwater wells have been located in the proposed chapter on Significant Groundwater Wells. When Chapter 2 is next reviewed for general changes, it may be appropriate to add a cross reference from Chapter 2 to Chapter 342, or otherwise indicate the requirements in Chapter 2.

4. Comment. I firmly believe that permits and fees etc. for water extraction should be done entirely by the community in which the water is expected to be withdrawn. I firmly believe that it should be done by the State. Water belongs to the people of Maine, and more so, to the people of whatever community the body of water or aquifer is in or shared within if that's the case. The people of those towns have the say of what is done or what cannot be done to their own water. Please protect Maine's communities' rights to regulate their own water extraction and regulations.(2)

Response. This rulemaking does not affect municipal authority to require a local permit or to otherwise restrict or prohibit activities within the municipality. The rule has been modified as described in Response to Comment 7, to account for the fact that effects of significant groundwater extraction may extend beyond the immediate abutters of the property or the municipality in which the activity will occur, and to provide better notice to nearby municipalities.

5. Comment. The proposed fee system to cover the expense of hiring third party professionals to review data seems to make sense. A sliding fee scale based on quantity pumped seems to be a fair way to set the fee. I am wondering if $50/million gallons pumped will be sufficient to cover the costs incurred. In the public meetings that I attended, it was stated that the extractor was responsible for submitting monitoring data and that there were not sufficient DEP staff available to read the reports in a timely fashion. If my calculations are correct, 100 million gallons would be a $5,250 fee. This doesn't sound like enough to cover the cost of a third party professional to do the proper review and assessment of the monitoring information. (3)

Response. The department interviewed several consulting environmental professionals in order to determine the likely costs of reviewing these data. The fee is based on the results of these discussions, the observed actual volumes of water pumped, and department assessment of the level of investigation and analysis required to demonstrate compliance with permit conditions.

6. Comment. I would like to suggest that the third party professional not be or be perceived to be connected with the extractor in any way. Water is a vital resource to the health and safety of the people of this state and it should be protected as such. (3)

Response. The qualifications of the third-party professional will be addressed through contract requirements, rather than in the rule. The department will keep the observation in mind.

7. Comment. In regards to notice for public informational meetings, it might be good to include notice to abutters in the same watershed of the extraction site, even though that could potentially be several miles away. Notice should also be given to municipal officers of all abutting towns. The more transparent

it is, the better. Extraction of massive amounts of water has the potential to affect many citizens in that watershed. Water sources for extraction sites are not limited to the area that the bore wells are placed. The water withdrawn can cross property boundaries and town lines. It is my belief that simply using public notice procedures for "other significant types of projects" is not enough. Groundwater is unique from other projects in that it is essential for life and should be guarded and protected as a public resource. Those that depend on this resource should be given proper notice and access to the process. (3)

Response. The department agrees that notice of the public information meeting is important. The department has referenced the requirements for public informational meetings that currently exist in Chapter 2, so that the notice provisions in Chapter 2 apply. The provision is interpreted to require notice to abuttors to the parcel. The municipality or municipalities where the property is located must be notified, and information must be placed in a newspaper of general circulation in the area where the project is located.

The department agrees that, due to the nature of groundwater use and movement, some additional notice is warranted, because the affects of a significant groundwater withdrawal may extend beyond the property line in ways that differ from other significant types of projects. It is important that the notice requirement be very clear as to who should receive the notice. Also, the applicant should not be expected to notify a large number of people who may not be affected at all. Groundwater recharge in Maine's climate and geology generally occurs within a relatively short distance of the extraction sites, and significant groundwater wells almost certainly will be located within distinct and relatively well-defined geological units of extremely high yield. Notifying all people in the same watershed as the project, or in all abutting towns, would often result in notification of many people who would not potentially be affected.

The department has added an additional notice provision beyond those in Chapter 2 that requires the applicant to notify a municipality that (a) abuts the municipality where the project is located, and (b) has land located in the same mapped significant groundwater aquifer as the aquifer where the project is located. Where a municipal boundary abutted land under the jurisdiction of the Maine Land Use Regulation Commission (LURC), and the mapped significant groundwater aquifer extended into LURC jurisdiction, the applicant would be required to notify LURC. Although some of these municipalities may not be affected by the withdrawal, the universe of those to be notified is reasonably small, and there is some likelihood that the members may be affected.

For reference, the existing notice provisions contained in Chapter 2, section 13 (in part) are as follows.

> At least 10 days prior to the public informational meeting, notice of the informational meeting must be sent by certified mail or certificate of mailing to abutters and to the municipal office of the municipality(ies) where the project is located. At least 7 days prior to the informational meeting, notice must also be published once in a newspaper of general circulation in the area where the project is located. The notice must contain at least the following information:
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> A. Name, address and telephone number of the applicant;
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> B. Citation of the statutes or rules under which the application will be processed;
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> C. Location and summary description of the activity;
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> D. The date, time and place of the public informational meeting; and
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> E. That a purpose of the meeting is for the applicant to seek public comment on the project.

Rules Concerning the Processing of Applications and Other Administrative Matters, 06-096 CMR 2(13)(in part).

8. Comment. The last issue that is important to me as an independent citizen of this state is that this rule making should in no way remove or hinder a municipalities right to require their own local municipal permits. Home rule is important to the citizens and voters of this state. The value of local control should not be underestimated. (3)

Response. This rulemaking does not affect municipal authority to require a local permit.

9. Comment. We support the proposed Rule-making Proposal for Chapter 342, Significant Groundwater Wells, which will provide a fee structure needed to cover supplemental technical review and assessment of monitoring information submitted by applicants for groundwater well and withdrawal permits. Such rule-making was required by PL 2007, ch.399(15), as amended by PL 2009, ch 295(4). This rule-making also rightly extends to groundwater withdrawal permits Departmental Rules for public information, pre-application and pre-submission meeting requirements.

Extensive, thorough, independent review is certainly needed to evaluate the environmental, economic and social impacts of withdrawal. Critical to the Congress of Lake Associations is the impact on the hydrological cycle affecting the health of Maine's lakes, so vital to our economic and social well being. Reviews need to be broad-based to cover these impacts. Reviews must assess the accuracy and scope of information submitted by interested parties. They need to reach beyond the information submitted by interested parties or those with limited scope.

In fact, speaking beyond the authority for this particular Rule-making, we would like to see Statewide authority with Rule-making to cover groundwater extraction that would include a fee system that would make possible much-needed additional data collection, mapping, analysis and interpretation of groundwater resources. More steam gauges are needed and we don't have enough of them.

Notably, Maine's financial straits make a fee system particularly critical. (4)

Response. The last part of the comment suggests the establishment of a state-wide authority with rulemaking authority and the ability to charge fee to cover specific tasks. This goal is beyond the scope of this rulemaking.